

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

DYLON PARKS AND BRYAN JOHN,)	
)	
Employees/Grievants,)	CONSOLIDATED
)	
)	DOCKET No. 17-05-669
)	
DEPARTMENT OF NATURAL RESOURCES AND)	
ENVIRONMENTAL CONTROL,)	<u>DECISION AND ORDER OF DISMISSAL</u>
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) on September 21, 2017, at 9:00 a.m. at the Public Service Commission, Cannon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, Jacqueline D. Jenkins, and Victoria D. Cairns, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah Murray-Sheppard
Board Administrator

Cpl. Dylon Parks
Lt. Bryan John
Employees/Grievants *pro se*

Kevin Slattery
Deputy Attorney General
on behalf of the Department of
Natural Resources and Environmental
Control

BRIEF SUMMARY OF THE EVIDENCE

The Board heard legal argument from the parties on the motion by the Department of Natural Resources and Environmental Control (“DNREC”) to dismiss the appeal of the employees/grievants, Cpl. Dylon Parks (“Parks”) and Lt. Bryan John (“John”), for lack of jurisdiction.

FINDINGS OF FACT

The jurisdictional facts are not in dispute.

Cpl. Parks and Lt. John were and are employed by DNREC and serve as Enforcement Officers stationed at the Delaware Seashore Park in Sussex County, Delaware.

Executive Order 77 (“EO 77”), Employee Obligations During Severe Weather Conditions and Emergencies, was issued in by Governor Castle in 1987, modified by Governor Minner in 2005, and has remained in full force and effect at all times relevant to these grievances. Executive Order 77 defines an “essential employee” as, “An employee who is indispensable to the emergency service function of his or her employing agency or department and is required to assist the department or agency in meeting its operational needs.” The Order further states, in relevant part:

4. The Order may require certain employees to work during the emergency. Those required to work during times when the Governor has excused some employees from reporting to work are referred to as “*Essential*” employees. An *Essential* employee is defined as one who is indispensable to the emergency service function of the employing agency or department and is required to assist the department or agency in meeting its emergency operational needs, e.g., food, medical, housing, maintenance, personal care, hospital care, emergency road service. These examples are not exhaustive...
7. *Essential* employees who live or work in a region or regions covered by the Governor’s Order, and who are required to work, are entitled to compensation at their regular hourly rate plus equal time off for all hours worked during their regularly scheduled work hours or shift. All *Essential*

employees who work additional hours shall be compensated in accordance with existing rules and policies governing overtime payment. Employees covered by the Fair Labor Standards Act (FLSA) are compensated for overtime at time and a half and receive equal time off while employee exempt from FLSA are compensated at straight time rates and receive equal time off. Exceptions to this may be found in the Budget epilogue or Merit Rules for specific groups of employees... *[emphasis in original]*

Both Cpl. Parks and Lt. John were and are essential employees who are required to report for work during severe weather conditions and emergencies as defined in EO 77.

On the weekend of January 23 and 24, 2016, Delaware experienced a severe winter weather event. In anticipation of the storm, the Governor declared a State of Emergency for all three counties of the State, beginning at 5:00 p.m. on Friday, January 22, 2016, and continuing until 12:00 a.m. on Monday, January 25, 2016. Additionally, on Monday, January 25, 2016, the Governor also directed that all State offices would have a two-hour delay and would open at 10:00 a.m.

On January 25, 2016, Cpl. Parks applied for 16.5 hours for “equal time off for all hours worked” during his regularly scheduled work hours during the State of Emergency (i.e., compensatory time), as set forth in ¶7 of EO 77. Lt. John applied for 20.5 hours of compensatory time for the hours he worked beginning at 6:30 a.m. on January 23, through 10:00 a.m. on January 25, 2016. Both Grievants’ requests for compensatory time under EO 77 were denied.

CONCLUSIONS OF LAW

Merit Rule 19.0 defines a “grievance” as:

Merit employee's claim that these [*Merit*] Rules or the Merit system statute has been violated. A grievance may not deal with the content of the Rules or the Merit system statute.

The remedial powers are the Board may be invoked to correct a “... misapplication of any provision of the [*Merit statute*] or the Merit Rules.” 29 Del.C. §5931(a).

The Grievants assert they were denied equal time off for hours worked during a severe

weather related emergency over the weekend of January 23 and 24, 2016, as is provided for in Executive Order 77. They assert that because the misapplication of EO 77 resulted in their receiving less compensation (i.e., equal time off) for hours they worked during the emergency, this error also constituted a violation of Merit Rule 4, Pay Plan.

There is no analogue to ¶7 of Executive Order 77 in either the Merit statute or the Merit Rules. The Board does not have jurisdiction over a claimed violation of an Executive Order which does not independently violate the Merit statute or the Merit Rules. *Elisha Gresham v. DNREC* MERB 12-11-572 (2013). While it is conceivable that an Executive Order could include an enforcement mechanism (such as this Board) where the Order establishes an obligation which relates to the wages of State employees in the classified service, EO 77 does not do so.

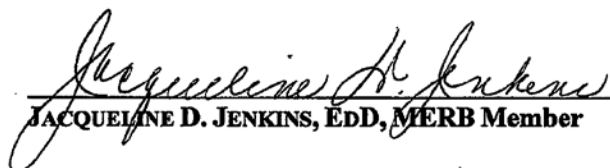
The Board concludes as a matter of law that it does not have jurisdiction over these grievances because they do not state a claim for a violation of the Merit statute or Rules for which relief can be granted.

DECISION AND ORDER

It is this **28th** day of **September, 2017**, by a unanimous vote of 4-0, the Decision and Order of the Board to grant the agency's motion to dismiss and to dismiss these grievances for lack of jurisdiction.


W. MICHAEL TUPMAN, MERB CHAIR


PAUL R. HOUCK, MERB Member


JACQUELINE D. JENKINS, EDD, MERB Member


VICTORIA D. CAIRNS, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievants shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievants. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: September 28, 2017

Distribution: Original: File

Copies: Grievants
Agency's Representative
Board Counsel
MERB Website